FILED
SEP 18 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-303

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

HUMANA INC. and HUMANA HEALTH INSURANCE OF NEVADA, INC.,
Petitioners,

v.

MARY FORSYTH, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* THE NATIONAL FAIR HOUSING ALLIANCE IN SUPPORT OF RESPONDENTS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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13 pp

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BRIEF OF *AMICUS CURIAE* THE NATIONAL FAIR HOUSING ALLIANCE IN SUPPORT OF RESPONDENTS

The National Fair Housing Alliance, as *amicus curiae*, suggests that the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 23, 1997 be affirmed.[1]

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, *amicus* states that no counsel for a party has authored any part of this brief, and no person or entity, other than the *amicus*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief.

INTERESTS OF THE *AMICUS CURIAE*

The National Fair Housing Alliance, Inc. (NFHA) is a non-profit corporation that represents private fair housing centers throughout the United States. NFHA's purpose is the achievement of "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." It attempts to fulfill that purpose by conducting research into the nature and effects of housing discrimination, advocating for effective programs of fair housing compliance enforcement, sponsoring national education conferences on fair housing issues and fair housing litigation, and participating in fair housing cases as a litigant. NFHA also attempts to identify and eliminate housing practices that are discriminatory and that constitute barriers to equal access to housing.

NFHA has a direct interest in the application of statutes prohibiting discrimination in housing, including discrimination by homeowners insurers. To that end, NFHA seeks leave to participate as *amicus curiae* in those cases that interpret the laws of the United States as they affect fair housing. In this case, the interpretation of the McCarran-Ferguson Act advocated by the petitioners as grounds for reversal of the Court of Appeals for the Ninth Circuit has important implications for the enforcement of federal statutes that affect fair housing, including the Fair Housing Act and the Truth in Lending Act.

Petitioners and respondents have consented to this *amicus curiae* brief. Copies of the letters granting consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

Petitioners urge the Court to interpret the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, to bar suit against an insurance company because the remedies available under the federal statute upon which the suit is based differ from those available under Nevada's insurance laws. Federal statutes often include remedies, such as

private rights of action, punitive damages, and awards of attorneys' fees to the prevailing party, that are not available under state insurance codes. This Court has held that private actions are essential to the enforcement of many federal statutes, including civil rights laws. Under petitioners' suggested interpretation of the McCarran-Ferguson Act, however, such actions against insurers would be barred unless a state's insurance code happened to allow them. Petitioners' interpretation conflicts with the Act itself, which specifically allows federal antitrust suits against insurers, even though the antitrust laws include remedies that are not available under state insurance law. Moreover, without evidence of a reasoned state policy of exclusive administrative enforcement, it would be a pointless act of imagined deference to apply the Act out of concern for the effect that suits under federal law may have on the state administrative process.

ARGUMENT

THE McCARRAN-FERGUSON ACT DOES NOT APPLY TO BAR SUIT UNDER A FEDERAL STATUTE UNLESS THERE IS A DIRECT SUBSTANTIVE CONFLICT OR THE PURPOSE OR EFFECT OF THE FEDERAL LAW IS PRIMARILY TO REGULATE THE BUSINESS OF INSURANCE.

In this lawsuit, the Court is asked to determine whether the McCarran-Ferguson Act bars enforcement of the Racketeer Influenced and Corrupt Organizations Act ("RICO") against an insurance company. Petitioners do not argue that there is any conflict in the *substance* of the law applied to the insurer: RICO and Nevada law each forbid the same actions. Indeed, it is well established that if there is a direct conflict in substantive law, the McCarran-Ferguson Act will prevent the federal law from being enforced.[2] Rather, petitioners argue that the

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[2] *See Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 463 (1969).

differences in *remedies* available under RICO are sufficient to "invalidate, impair, or supersede" Nevada insurance law, thus raising the McCarran-Ferguson Act's bar to enforcement of the federal statute.[3]

Many states have codes to regulate the activities of insurers, codes that often provide only for administrative enforcement.[4] When sued for violating general federal statutes, such as the Fair Housing Act or the Truth in Lending Act, insurers often raise those state codes as a defense, arguing that the remedies available under federal law, such as a private right of action, fee shifting, or punitive damages, will impermissibly "impair" the state's administrative scheme.[5] Until recently, no appeals court was persuaded: the circuits uniformly held that, in the

[3] The pertinent text of the Act, codified at 15 U.S.C. § 1012(b), states that:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

[4] *See, e.g., N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d 287, 295 (7th Cir.), *cert. denied*, 508 U.S. 907 (1993) (Wisconsin insurance code does not create a private right of action); *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1491 (9th Cir.), *cert. denied*, 516 U.S. 964 (1995) (California insurance code allows only administrative enforcement); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1363 (6th Cir.), *cert. denied*, 516 U.S. 1140 (1996) (Ohio insurance code does not afford a private right of action).

[5] *See, e.g., Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1363 (6th Cir.), *cert. denied*, 516 U.S. 1140 (1996) (insurer argued that the availability of private civil actions, jury trials, and unlimited punitive damages under the Fair Housing Act would impair or supersede Ohio insurance law); *Edwards v. Your Credit, Inc.*, 148 F.3d 427, 432-35 (5th Cir. 1998) (insurer argued that the availability of a private right of action under the Truth in Lending Act would impair or supersede Louisiana insurance law).

absence of a direct substantive conflict, federal and state law remedies could co-exist.[6]

Now, however, one appeals court has deemed a difference in remedial provisions to be sufficient reason to trigger McCarran-Ferguson. Upholding the dismissal of a RICO claim, the Eighth Circuit opined that "the possibility of treble damages and attorney fees [under RICO] would eviscerate the administrative system by diverting any rational aggrieved policyholder from the [state Insurance] Commissioner's office to federal court." *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297, 1306 (8th Cir. 1997).[7] Petitioners argue that this reasoning should be applied to the case against them, too.

Although the issue, as narrowly framed for decision, seems only to involve RICO and the effect of its treble damages and attorney fee awards on state insurance law, the ramifications of this Court's decision will spread much more widely. Private civil suits are essential to the enforcement of many federal laws, as this Court has often recognized.[8] But if private suits under federal law "im-

[6] *See, e.g., N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d 287, 296 (7th Cir.), *cert. denied*, 508 US. 907 (1993); *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1492 (9th Cir.), *cert. denied*, 516 U.S. 964 (1995); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1363 (6th Cir.), *cert. denied*, 516 U.S. 1140 (1996); *Villafane-Neriz v. F.D.I.C.*, 75 F.3d 727, 736 (1st Cir. 1996); *Murff v. Professional Medical Ins. Co.*, 97 F.3d 289, 292 (8th Cir.), *cert. denied*, 117 S.Ct. 2452 (1997).

[7] In an unpublished *per curiam* opinion, the Court of Appeals for the Fourth Circuit indicated that it, too, viewed RICO's potential disruption of state administrative enforcement mechanisms as an "impairment" sufficient to trigger the McCarran-Ferguson Act's prohibition. *See Ambrose v. Blue Cross & Blue Shield of Virginia, Inc.*, 891 F. Supp. 1153, 1164-68 (E.D. Va.), *aff'd*, 95 F.3d 41 (4th Cir. 1996).

[8] *See, e.g., Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) ("a private cause of action . . . constitutes an essential tool for enforcement of the 1934 [Securities Exchange] Act's requirements");

pair" state insurance regulation, as petitioners suggest they do, then enforcement of those national policies will be left to the limited resources and sometimes less-than-vigilant efforts of the state insurance commissioners.

Moreover, private enforcement is possible only because Congress has allowed remedies, such as attorney fee awards and punitive damages, in civil rights cases and other actions in which the amount of money damages at stake is small but the principles are vitally important. If those remedies are sufficient to raise the McCarran-Ferguson bar, then—as a practical matter—private enforcement of those federal laws against insurance companies will end, even if a private right of action is nominally available.[9]

When it passed the McCarran-Ferguson Act, Congress did not intend to limit its ability to make laws of general application apply to insurance companies.[10] Rather, it in-

Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 263 (1975) ("Congress has opted to rely heavily on private enforcement to implement public policy"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974) ("the private right of action remains an essential means of obtaining judicial enforcement of Title VII"); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) ("complaints by private persons are the primary method of obtaining compliance with the [Fair Housing] Act"); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (Congress allowed fee-shifting under Title II because a plaintiff who obtains relief in a civil rights lawsuit "does so not for himself alone but also as a 'private attorney general' ").

[9] Public enforcement by federal agencies would also be hampered. *Cf. Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 463 (1969) (insurer argued that remedy sought by Commission for securities fraud would "invalidate, impair, or supersede" Arizona's insurance laws).

[10] Had it so intended, it would have made the Act to read "No [Act of Congress] shall be construed to *apply* to the business of insurance." *Merchants Home Delivery Service, Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1492 (9th Cir.), *cert. denied*, 516 U.S. 964 (1995).

tended to shield the states' ability to regulate insurers from inadvertent preemption by federal law. *See, e.g., U.S. Department of Treasury v. Fabe*, 508 U.S. 491, 499-500 (1993).[11] Accordingly, this Court has held that a federal law does not "invalidate, impair, or supersede" state insurance law unless there is either (1) a direct substantive conflict between them or (2) the purpose or effect of the federal law is primarily to regulate the business of insurance. *See Securities and Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453, 463 (1969).[12]

Petitioners urge the Court to broaden that test to encompass federal statutes that have remedies "materially different" than those available under state law. Such a departure is ill-advised, for three reasons. *First*, it does not comport with the McCarran-Ferguson Act itself, which specifically *allows* actions against insurers under federal antitrust laws. Those laws have remedies (such as treble damages) that differ materially from state-law administrative sanctions.[13] *Second*, as noted above, peti-

[11] The Court noted that "The first section of the McCarran-Ferguson Act makes its mission very clear: '. . . that silence on the part of Congress shall not be construed to impose any barrier to the regulation [of the business of insurance] by the several States.' " *Id.* at 500, *quoting* 15 U.S.C. § 1011.

[12] In *National Securities*, the Court upheld enforcement of a federal securities law that it deemed not to "affect a matter predominantly of concern to policyholders alone." *Id.* Matters that were predominantly of concern to policyholders alone, the Court determined, were "the business of insurance," which the McCarran-Ferguson Act left to state regulation absent an explicit statement by Congress. *Id.* at 460. The federal law at issue in *National Securities*, however, was "at least as important to those owning the companies' stock as it is to those holding their policies," and therefore not subject to the Act's bar. *Id.* at 463. By way of contrast, the Court noted that "if the Federal Government were attempting to regulate in the sphere reserved primarily to the States" by the Act (namely, the "business of insurance"), different questions about the Act's applicability would arise. *Id.*

[13] Under 15 U.S.C. § 1013(a), application of federal antitrust laws "to the business of insurance or to acts in the conduct thereof"

tioners' test would jeopardize the enforcement of many other federal statutes, such as the Fair Housing Act and the Truth in Lending Act, that also have remedies that differ from those available under state law. *Finally*, the mere fact that one set of remedies is available under a state's insurance laws does not prove that the state legislature intended those remedies to be exclusive.[14] Absent such proof, the application of McCarran-Ferguson to bar enforcement of a federal law—in imagined deference to state insurance regulation—would be a pointless but ironic act.

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was partially suspended until June 30, 1948. After expiration of this moratorium, however, Congress made clear that the antitrust laws would apply to the business of insurance "'to the extent that such business is not regulated by state law.'" *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 220 (1979), *quoting* 91 Cong. Rec. 1443 (remarks of Sen. Ferguson). Where appropriate, the antitrust laws have been applied to insurance companies. *See, e.g., Garot Anderson Marketing, Inc. v. Blue Cross and Blue Shield United of Wisconsin*, 772 F. Supp. 1054, 1063 (N.D. Ill. 1990) (Sherman Act); *American Family Life Assurance Co. v. Planned Marketing Assocs., Inc.*, 389 F. Supp. 1141, 1147 (E.D. Va. 1975) (Sherman and Clayton Acts).

[14] As the Court of Appeals for the Third Circuit recently observed, the mere absence of a private right of action under state insurance law does not indicate "a reasoned state policy of exclusive administrative enforcement." *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185, 195 (3rd Cir. 1998).

CONCLUSION

For the reasons set forth above, the judgment and opinion of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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